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Supreme Court of the United States

OCTOBER TERM, 1957.

WILLIE BENNETT,

Petitioner,

against

SS. *MORMACTEAL*, her engines, etc.,

and

MOORE McCORMACK LINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
I.—The Questions Presented	1
II.—Statement of the Case	2
Argument:	
(1) The Petitioner's Theories	3
(2) All longshoremen are subject to The Compensation Act, regardless of by whom employed	6
(3) Longshoremen have been employed by some shipowners for many years. During all this time there has never been any complaint from longshoremen's Unions, or from the great majority of steamship owners, who choose to hire longshoremen through independent contractors	11
(4) The legal fiction of the personification of a vessel	12
(5) The prior unsuccessful attempts to hold an employer's vessel liable *in rem* when the same employer has complied with the provisions of The Compensation Act	17
(6) The cases cited by the Petitioner are not relevant. No case holds, or even implies that The Compensation Act does not apply to every employer of longshoremen	18
Conclusion	19

TABLE OF CASES.

	PAGE
Atlantic Transport Co. v. *Imbrovek*, 234 U. S. 52, 34 S. Ct. 733 (1914)	4
City of Norwich, The, 118 U. S. 468, 6 S. Ct. 1150 (1886)	13
Conzo v. *Moore-McCormack Lines*, 114 F. Supp. 956 (1955)	18
Consumers Import Co., et al. v. *Kabushiki Kaisha Kawasaki Zosenjo, et al.*, 320 U. S. 249, 64 S. Ct. 15 (1943)	12, 13, 14
Davis v. *Department of Labor*, 317 U. S. 249, 63 S. Ct. 225 (1942)	9, 10
Eugene F. Moran, The, 212 U. S. 466, 29 S. Ct. 339 (1909)	14
Ginnis v. *Southerland*, 50 Wash. 2d 557, 313 P. 2d 675 (1957)	18
Grillea v. *United States*, 232 F. 2d. 919 (2 C. A. 1956)	19
Hahn v. *Ross Island Sand & Gravel Co.*, 320 P. 2d 668 (66 Or. Adv. Sh. 117)	9, 10
Halcyon Lines v. *Haenn Ship Corp.*, 342 U. S. 282, 72 S. Ct. 277 (1952)	9
International Stevedoring Co. v. *Haverty*, 272 U. S. 50, 47 S. Ct. 19 (1926)	4, 5, 6, 7
Pacific Line, The, 31 F. 2d. 152 (D. C. W. D. Wash. S. D. 1929)	18
Samuels v. *Munson S. S. Line*, 63 F. 2d 861 (5 C. A. 1933)	17
Seas Shipping Co. v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872 (1946)	12, 18
Smith v. *The Mormacdale*, 198 F. 2d 849 (3 C. A. 1952); cert. den. 345 U. S. 908, 73 S. Ct. 648	17, 20
Swanson v. *Marra Bros.*, 328 U. S. 1, 66 S. Ct. 869 (1946)	5, 18

PAGE

United States v. *Atlantic Mutual Insurance Co.*, 343 U. S. 236, 72 S. Ct. 666 (1952) 9
Uravic v. *Jarka Co.*, 282 U. S. 234, 51 S. Ct. 111 (1931) 5
Vitozi v. *SS Platano*, 1950 A. M. C. 1686 (not officially reported) 18
Western Maid, The, 257 U. S. 419, 42 S. Ct. 159 (1922) 14

STATUTES.

Compensation Act 33 U. S. C. 901 ..... 3, 4
Section 5 ..... 5, 9, 12, 15
33 U. S. C. 903, 905 5
Section 5 ..... 16, 17
33 U. S. C. 933 15
Section 33 ..... 15, 16
33 U. S. C. A. 933b 16
Jones Act, 46 U. S. C. 688 7
Federal Employers' Liability Act, 45 U. S. C. 51 8
Ship Mortgage Act, 46 U. S. C. 911, Sec. 953(a) 8
46 U. S. C. 182 13

AUTHORITY.

Law of Admiralty; Gilmore and Black, 1957, Chapter 9, paragraphs 3 to 18 15

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I.

THE QUESTIONS PRESENTED.

1. Are the provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as The Compensation Act) inapplicable when the Employer of the longshoreman happens also to be a shipowner?

2. Should the legal fiction that a vessel is a "person" be applied so as to circumvent the exclusive liability provisions of The Compensation Act by permitting a suit *in rem* against a vessel owned by an employer?

The above questions present the real issues. The questions presented in the petition express a complaint by an individual longshoreman who has accepted compensation payments and medical benefits under The Compensation

Act and who now feels that the progressive concepts of Workmen's Compensation are inequitable because these exclusive liability provisions "deprive" and "preclude" him from bringing a suit under the General Maritime Law.

Similar questions may be asked by any of the millions of workmen who are within the statutory scheme of compensation. Every person who is entitled to the certain benefits of some compensation act must, in turn, exchange these benefits for relinquishment of the right to sue his employer, whether under the Common Law, if a worker ashore, or under the General Maritime Law, if a longshoreman or harbor worker who is injured on navigable waters within the jurisdictional scheme of The Compensation Act.

II.

Statement of the Case.

This is a suit in Admiralty by a longshoreman to recover money damages on account of an injury on May 29, 1953, against the Moore-McCormack Lines, Inc., personally, and against the SS. *Mormacteal in rem.* The *Mormacteal* was owned and operated by Moore-McCormack Lines, Inc., the same corporation named as respondent in the suit *in personam*, and which corporation has filed a claim as owner of the *Mormacteal*.

The case was decided on respondent's Exceptive Allegations in the Courts below on the following uncontroverted facts:

1. The Petitioner was a longshoreman and was neither a master, nor a member of the crew of the *Mormacteal*, the vessel on which he was injured, or of any vessel owned or operated by the respondent.

2. At the time of the accident which is the basis of this suit, the Petitioner was an employee of the respondent, Moore-McCormack Lines, Inc.

3. The Petitioner has received compensation payments under The Compensation Act (33 U. S. C. 901, *et seq.*), from May 30, 1953, to July 19, 1953.

4. These payments and additional medical benefits were received as a longshoreman employee from his employer, the respondent, Moore-McCormack Lines, Inc.

5. Respondent had fully complied with all the requirements of The Compensation Act at all the times involved.

ARGUMENT.

(1) *The Petitioner's Theories.*

Faced with the fact that there is not a single case decided on facts which took place after the enactment of The Compensation Act in 1927, which holds that a longshoreman may sue his employer, or his employer's vessel *in rem*, the Petitioner is forced to rely on unsupported theories and inapplicable legal fictions.

The Petitioner's attempt is the fifth time since 1927 that a longshoreman has sought to circumvent The Compensation Act by suing his employer's vessel *in rem*. In each case, the attempt has been unsuccessful.

The Petitioner's theories may be described as follows:

A. Although all longshoremen such as the Petitioner are entitled to the benefits and subject to the immunities of The Compensation Act and must, therefore, in consideration of assured payments and medical benefits received thereunder, give up any right to sue

his employer for money damages for personal injury (33 U. S. C. 905*), the Petitioner, nevertheless still has the right to sue his employer and thus may obtain benefits under The Compensation Act, and subsequently sue his employer,—solely because his employer happens also to be a shipowner, rather than an independent stevedoring contractor. The Petitioner, in support of this amazing claim, merely states that it was never intended, when The Compensation Act was passed, that longshoremen be employed by anyone but independent stevedoring contractors. Petitioner is unable to refer to any exception or implication in The Compensation Act to support his claim that the term "employer" under The Compensation Act should be so limited.

B. Under the Maritime Law of the United States a vessel may be personified for certain purposes. Therefore, even if the Petitioner may not sue Moore-McCormack Lines, Inc., directly, as respondent, yet he may sue the *Mormacteal*, although this vessel is owned by the respondent, and the respondent must pay any damages for which its vessel may be found liable.

Being unable to supply any case in point, the Petitioner refers to the following three cases: *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 34 S. Ct. 733 (1914); *Inter-*

* 33 U. S. C. 905: *Exclusiveness of Liability.* The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

national Stevedoring Co. v. *Haverty*, 272 U. S. 50, 47 S. Ct. 19 (1926); and *Uravic* v. *Jarka Co.*, 282 U. S. 234, 51 S. Ct. 111 (1931), and cites these cases for the proposition that longshoremen are "seamen" and are, therefore, entitled to sue their employers for damages under the Jones Act. It need hardly be pointed out that each of these cases involves an action by a longshoreman against an independent stevedoring contractor and not against a shipowner-employer, and that, after the enactment of The Compensation Act in 1927, any such action was prohibited by Section 5 of that Act.

The Petitioner apparently refuses to recognize that this court in *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1, 66 S. Ct. 869 (1946) pointed out the obvious distinction between the rights of those "seamen" who are members of the crew and those "seamen" who load and unload vessels (longshoremen). (33 U. S. C. 903, 905)

In the *Swanson* case, this Court pointed out, in an opinion by Mr. Justice Stone, 328 U. S. 5, that

> "We have no occasion to consider here whether Congress by the Jones Act, undertook to or could give a remedy against the employer for injuries caused by a vessel to his employees, not members of the crew of the vessel, while working on shore. For Congress, by later legislation, has expressed its purpose to restrict the liability of the employer under federal statutes to injuries to his employees occurring on navigable waters or inflicted upon an employee who is either a master or a member of a crew of the vessel, injured in the course of his employment as such."

and, again at Page 7, Mr. Justice Stone said:

> "We must take it that the effect of these provisions of the Longshoremen's Act is to confine the

benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act."

In the face of the *Swanson* case, and after citing three cases by longshoremen against independent stevedoring contractors, the Petitioner makes the astounding statement at Page 7 of his Petition that

> "These decisions have never been overruled so as to change the right of maritime workers to sue employer-steamship companies for damages, for personal injuries when they are, as here, directly employed by them."

What the Petitioner is saying is that the cases holding that a longshoreman could sue his employer before the enactment of The Compensation Act should be applied today, ignoring the intent of Congress that the benefits and immunities of workmen's compensation should be applied to all longshoremen and to all employers of longshoremen.

(2) *All longshoremen are subject to The Compensation Act, regardless of by whom employed.*

Petitioner would have this Court believe that Congress, in enacting The Compensation Act, meant that Act to apply only to the relationship of longshoreman and independent stevedoring contractor and that The Compensation Act was not to apply when the longshoreman's employer happens also to be a shipowner. Petitioner's argument is based on the fact that in the *Haverty* case, (*International Stevedoring Co. v. Haverty*, 272 U. S. 50, 47 S. Ct. 19 (1926) a long-

shoreman was considered as included within the term "any seaman" in the Jones Act (46 U. S. C. 688), and consequently, had a right to the benefits of that statute in a suit against his employer, and because The Compensation Act was enacted subsequent to the *Haverty* case, Congress was simply providing a compensation act for independent stevedoring contractors in lieu of the Jones Act liability referred to in the *Haverty* case.

The Petitioner fails to note that the Hearings before the Committee of the Judiciary of the House of Representatives and before the Senate Judiciary Committee, 69th Congress, First Session, were held in March and April of 1926, months before the *Haverty* case was decided, and it was at these Hearings that it was made more than apparent that the persons who were considering the enactment of The Compensation Act, clearly understood that even in 1926, longshoremen were in some instances employed by steamship owners. For example: in the Hearings before the Committee of the Judiciary of the House of Representatives, held on April 8th, 15th and 22nd, 1926, on H. R. 9498, the following questions were asked by Congressmen Bowling of Alabama and Tucker of Virginia of Mr. Chlopek, who at that time was President of the International Longshoremen's Association:

> "Mr. Bowling: Would you mind telling us what the word 'longshoreman' includes? I live 500 miles from the ocean.
>
> "Mr. Chlopek: The word 'longshoreman' means a man who is engaged in loading and discharging a ship.
>
> "Mr. Tucker: Is he a federal employee?
>
> "Mr. Chlopek: Absolutely not. He is an employee of the contracting stevedore, *or the vessel owner who does his own stevedoring work*, unloading or

discharging his vessel in port." (Emphasis supplied).

And again at page 18, in a conversation between Congressman Hersey and Mr. Chlopek:

> "Mr. Hersey: When a longshoreman is injured in unloading a ship whom does he sue for damages under this bill?
>
> "Mr. Chlopek: Under this bill he could not sue anyone; he has workmen's compensation."

At page 40 of these hearings, Mr. Harry S. Austin, an attorney representing the International Longshoremen's Association, expressed the position of the Union to the effect that the Compensation Act was preferred by these Union groups to an employers' liability act similar to the Federal Employers' Liability Act, for railroad employees (45 U. S. C. 51, *et seq.*) because of the cost in time and money to longshoremen if they were required to institute law suits against their employers.

As a matter of fact, The Merchant Marine Act of 1920 recognized that longshoremen were then being hired directly by shipowners. Part of the Act of 1920 was the Ship Mortgage Act, 46 U. S. C. 911, *et seq.* Section 953 of that Act provides that upon a ship's mortgage being properly documented and filed, it shall become a maritime lien, but shall not be preferred to several other categories of maritime liens. Subdivision (a) of Sec. 953 describes one of such preferred maritime liens as "(2) a lien for damages arising out of tort, *for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel* • • •". (emphasis supplied)

The Ship Mortgage Act was enacted seven years prior to The Compensation Act. Therefore, Congress knew for

some time prior thereto that it was the practice in this country for shipowners as well as independent contracting stevedores to employ longshoremen.

At Pages 8, 9 and 10 of the Petition, the Petitioner points to various statements made by the persons testifying before the Senate and the House Judiciary Committees during the Hearings considering the enactment of the Longshoremen's and Harbor Workers' Compensation Act. These statements merely point out that, at that time some longshoremen were employed by independent stevedoring contractors. Not even the Petitioner is brash enough to say that, at that time there were no longshoremen employed by steamship owners. If one thing is clear, it is that, if the word "employer", as used in the Compensation Act, is to be limited to a particular category of employer, then that limitation can only come from Congress and to request that this Court change the meaning of that word is asking that the Court perform judicial legislation of the type which has been so recently condemned by this Court in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, 72 S. Ct. 277 (1952); and in *United States* v. *Atlantic Mutual Insurance Co.*, 343 U. S. 236, 72 S. Ct. 666 (1952).

At Page 11 of the Petition it is said that since this Court has granted a petition for certiorari in the case of *Hahn* v. *Ross Island Sand & Gravel Co.*, 320 P. 2d 668 (66 Or. Adv. Sh. 117) —Ore.—, it should grant certiorari here, since the issue here involves "another aspect of the same problem." The statement of the alleged issue in the *Hahn* case at Page 11 of the Petition is incorrect.

The *Hahn* case involved a revisit to the twilight zone concept announced by this Court in *Davis* v. *Department of Labor*, 317 U. S. 249, 63 S. Ct. 225 (1942) and does not involve any question concerning the exclusive liability provisions of Section 5 of The Compensation Act. The real

question in the *Hahn* case is whether an employee injured on a dredge permanently affixed to the shore has a right to select the compensation act of the State where the injury occurred, or is limited to the Longshoremen's and Harbor Workers' Compensation Act. The Oregon Compensation Act provides that the employer may elect whether to be subject to that Act. Under the Oregon Compensation Act, if an employer elects not to be subject to the Act, his employee may bring an action at common law.

The respondent-employer in the *Hahn* case voluntarily elected not to be subject to the Oregon Compensation Act. Consequently, in the *Hahn* case, if the State Compensation Act were to be applied, then, under his employer's option, Hahn would have had a right to sue his employer at common law.

The Oregon court held that the rule of the *Davis* case that certain workers who regularly work ashore, but who are injured on navigable waters may choose either State or Federal compensation does not apply where the choice is between Federal compensation or an action at law, even though the employer has voluntarily rejected coverage under a State Compensation Act.

In the present case, however, there is no question that The Compensation Act is the only compensation statute applicable. To say that the issue in the *Hahn* case, which, was,—whether the federal or state compensation act, or both acts, applied to the facts of that case—was the same as the issue in the case at bar, which is,—whether or not there should be a differentiation amongst the rights and immunities of employers of longshoremen—can only be an attempt to confuse.

(3) *Longshoremen have been employed by some shipowners for many years. During all this time there has never been any complaint from longshoremen's Unions, or from the great majority of steamship owners, who choose to hire longshoremen through independent contractors.*

The Petitioner, at page 12 of the Petition would have this Court believe that almost half of the longshoremen in the Port of New York are employed directly by shipowners. This is entirely incorrect.

While it is true that steamship owners comprise about 43% of the membership of the New York Shipping Association, the Petitioner has failed to point out that the New York Shipping Association is a membership corporation composed of many categories of member-employers.*

Of the 66 members of the New York Shipping Association who are steamship owners and agents, 22 employ harbor workers of some category. By no means all of these 22 employ longshoremen. The harbor workers employed by the 22 shipowners in the port of New York are made up of the following among others: handymen, sweepers, porters, drivers, mechanics, clerks, plumbers, coopers, carpenters, cargo checkers, ship fitters, electricians, designers, watchmen, guards, painters, baggage handlers and handlers of ship's stores. Most of the shipowners who hire the above employees do not hire "longshoremen" directly.

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* The New York Shipping Association is composed of the following groups: 66 steamship lines and agents; 47 contracting cargo repairmen; 10 contracting cargo checkers and clerks; 3 contracting maintenance workers; 16 contracting marine carpenters; and 11 contracting watching agencies.

If, as the Petitioner contends, a shipowner is not an employer within The Compensation Act, and, therefore, the immunity provisions of Section 5 of that Act do not apply to a shipowner, then, not only the longshoremen *per se* (viz. men who load and unload cargo), but a virtual host of harbor workers,—all of whom now are, and who have traditionally been employed by shipowners,—will not be subject to The Compensation Act, and, if injured on board a vessel in navigable waters, would be able to sue their employers under the General Maritime Law and, if their work is such that the unpredictable test of the *Sieracki* case (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872 [1946]) is met, viz., if they are doing work which is determined to have been traditionally performed by seamen (members of the crew) each of such harbor workers may have a right to sue his employer under the Jones Act. On the other hand, if longshoremen or harbor workers employed by shipowners are injured ashore (and many longshoremen and harbor workers at times work ashore) then they will be confined to recovery under the local State Compensation Act.

It is quite apparent that, if Petitioner's view were accepted, it will result in a virtual abandonment of The Compensation Act, for the shore-side employees of shipowners and the adding of chaos to a presently clear legal situation.

(4) *The legal fiction of the personification of a vessel.*

The most recent case in which this Court dealt with the subject of this legal fiction was *Consumers Import Co., et al.* v. *Kabushiki Kaisha Kawasaki Zosenjo, et al.*, 320 U. S. 249, 64 S. Ct. 15 (1943), where a shipowner defeated a claim

against it for cargo damage by referring to the so-called "Fire Statute" (46 U. S. C. 182*), which provides, in effect, that a shipowner shall not be held liable for damage to cargo due to fire, unless it be found that the fire was caused by the "design or neglect of such owner". The question before this Court in the *Consumers Import* case was: Does the fire statute extinguish *in rem* liability against the vessel for cargo damage, or is it confined to *in personam* liability only?

The cargo claimant in the *Consumers Import* case contended that, in spite of the statutory personal exoneration of the owner, the vessel was, nevertheless, individually bound to pay for the damage to the cargo because of the "personification" fiction. Mr. Justice Jackson of this Court referred to *The City of Norwich,* 118 U. S. 468, 6 S. Ct. 1150 (1886), in which it was held that the limitation of liability statutes (46 U. S. C. 181, *et seq.*) not only limited the *in personam* liability of a shipowner, but also any obligation of an owner to pay indirectly because of the attachment of a vessel owned by him.

Justice Jackson referred to the following language in *The City of Norwich,* Page 503, 118 U. S.:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles."

Justice Jackson, after making reference to the above quotation, continued, in his Opinion in the *Consumers Import* case, by saying, at Page 253:

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*"46 U. S. C. 182: Loss by fire. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

> "* * * The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age."

Mr. Justice Jackson continued at Page 254, as follows:

> "* * * There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not 'make good' to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them."

This Court in the *Consumers* case was affirming an opinion by Judge Learned Hand in the Court of Appeals for the Second Circuit found at 133 F. 2d 781, in which opinion, at page 784, Judge Hand said:

> "* * * To say that an owner is completely exonerated, although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing. That notion has indeed had its place in the law of the sea, but it is a bit of mythology, a fiction not to be applied to defeat a statute designed to protect and foster maritime enterprise."

Mr. Justice Holmes of this Court, has made clear in his opinions that he agreed with Judge Learned Hand and with Mr. Justice Jackson that the personification theory applied in Admiralty is nothing more than a legal fiction, not to be used indiscriminately. See: *The Eugene F. Moran*, 212 U. S. 466, 29 S. Ct. 339 (1909); and *The Western Maid*, 257 U. S. 419, 42 S. Ct. 159 (1922).

There has been some recent scholarly research into the personification theory by Professors Gilmore and Black, the authors of a recent text (1957) on the Law of Admiralty. In paragraphs 3 to 18 of Chapter 9, these authors have spent some time in exploring the original theories underlying the creation of a maritime lien and the tangential fiction of the personification of a ship. The conclusion concerning this subject reached by the above authors is worthy of repetition here (page 510 of the above text):

> "It may be concluded that the fiction of ship's personality has never been much more than a literary theme. As such it reached a height of popularity toward the turn of the century. Since then even as literature it has fallen into disrepute; thanks in part to the influence of Holmes and Learned Hand. Fictions serve many useful purposes in the law. Initially their introduction is apt to be a sign of disturbance and growth. But when a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of ship's personality, is always to be welcomed."

The incongruity of requiring a shipowner unconditionally to supply compensation payments and medical benefits to his longshoremen-employee, and, in spite of the specific immunizing provisions of Section 5 of The Compensation Act, also requiring the same shipowner to respond in money damages to the same employee, through the artificial means of a suit *in rem* against the vessel is apparent if one examines various sections of The Compensation Act.

Section 33 of the Act (33 U. S. C. 933) provides that an injured longshoreman may elect to attempt to hold "some person other than the employer" liable for his injury. When a longshoreman so elects, he has a right to sue that

"person other than the employer" and, if he is successful in recovering damages in that suit, he must reimburse his employer for the amount of compensation paid. There is likewise a *pro tanto* cancellation of any further compensation which may be due from his employer under the Act. If the longshoreman-employee is not successful in his action under Section 33 against the "person other than the employer", he may still claim further compensation benefits from his employer. It is merely playing with words to say that the employer's vessel is some person other than the employer when, as a matter of fact, the employer must necessarily pay for any recovery made by the libelant in his suit against the vessel.

The Petitioner must concede that from any recovery against the respondent-employer, *qua* shipowner, he will have to deduct and pay back to respondent-employer, *qua* employer, all the benefits which he has already admittedly accepted under The Compensation Act.

One of the objects of any compensation act is to secure speedy payment of benefits. Under The Compensation Act, an employer who desires to contest its liability under that Act to an injured employee is entitled to a hearing. After it is determined that the employer must pay compensation by reason of an award made by the Deputy Compensation Commissioner, any right of action which the injured employee may have against a third party is assigned to the employer by operation of law (33 U. S. C. A. 933b). Thus, if the Petitioner's theory was correct, we would have the anomalous situation of the respondent being the assignee of a claim against itself.

Since The Compensation Act was passed in 1927, it has been amended on 13 occasions. Congress changed 30 sections, a total of 89 times, but Section 5 (33 U. S. C. 905) has never been amended. Clearly, if the Petitioner's claim to

the effect that shipowners were not meant to be included within the purview of The Compensation Act is valid in any sense, then Congress, which has been particularly active in amending The Compensation Act, would certainly, by the simple amendment of Section 5, have made it clear that it was not intended that the Act should supply immunity in cases where longshoremen are employed by ship operators.

(5) *The prior unsuccessful attempts to hold an employer's vessel liable in rem when the same employer has complied with the provisions of The Compensation Act.*

The cases which have refused to abandon the modern overall purposes of The Compensation Act to the vagaries of mythology and a limited archaic fiction, have ample support in the writings of the leading jurists in this field. These cases are: *Samuels* v. *Munson S. S. Line,* 63 F. 2d 861 (5 C. A. 1933), where the facts were identical with those in the case at bar, and where the Court of Appeals for the Fifth Circuit refused to require a shipowner-employer to pay indemnity beyond the prescribed limits of The Compensation Act for an injury to a longshoreman.

In *Smith* v. *The Mormacdale,* 198 F. 2d 849, (3 C. A. 1952); cert. den. 345 U. S. 908, 73 S. Ct. 648, the Court of Appeals for the Third Circuit treated the same problem in an identical way.

In the *Smith* case, the Court referred to the personification theory as "a convenient conceptual tool" which may be used wisely when seeking security. The Court refused, however, to thwart the clearly manifested intention of Congress as expressed in The Compensation Act.

The further instances where The Compensation Act, has been sought to be set aside are cases in the United States District Court for the Southern District of New

York. They are: *Vitoxi* v. *SS Platano*, 1950 A. M. C. 1686 (not officially reported); and *Conzo* v. *Moore-McCormack Lines*, 114 F. Supp. 956 (1955). For an analogous situation, treated in the same fashion, see *Ginnis* v. *Southerland*, 50 Wash. 2d 557, 313 P. 2d 675 (1957).

Thus it appears that every Court which has been asked to extend the personification theory to a point where it would interfere with the modern public policy expressed by The Compensation Act has expressly refused to do so. It is apparent that the judges who decided these cases felt that to so apply it would not only be contrary to public policy, but would be contrary to common sense.

(6) *The cases cited by the Petitioner are not relevant. No case holds, or even implies that The Compensation Act does not apply to every employer of longshoremen.*

In *The Pacific Pine*, 31 F. 2d. 152 (D. C. W. D. Wash. S. D. 1929), the longshoreman-libelant was employed by an independent contracting stevedore. The only thing the *Pacific Pine* case held was that, where a shipowner is liable to be sued *in personam* as a third person,—that is a person other than an employer—by a longshoreman, then that third person's vessel may also be attached *in rem*.

The quotation from the case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872 (1946) at page 3 of the Petition is taken out of context and does not mean that the *Sieracki* case was intended to over-rule *Swanson* v. *Marra Bros.*, 328 U. S. 1, 66 S. Ct. 869 (1946). [The opinions in the *Swanson* and *Sieracki* cases were handed down on the same day.] Nowhere in the *Sieracki* case is it said, or even implied, that a shipowner who employs longshoremen need not provide federal workmen's compensation coverage to all employees within that Act.

The other case relied upon by the Petitioner is *Grillea* v. *United States*, 232 F. 2d. 919 (2 C. A. 1956). However, it is apparent that the facts in the *Grillea* case are materially different from those in the case at bar. The vessel, in the *Grillea* case was owned by a person other than the libelant's employer, viz. by a person who would be a third party within the meaning of Section 33 of The Compensation Act. There never was any defense imposed in the *Grillea* case that The Compensation Act afforded immunity to the respondent, United States, as a person, nor to the vessel, for the vessel was owned by persons "other than an employer."

Conclusion.

(1) The Petition does not represent a complaint from labor or management concerning the relationship between employee-longshoreman and employer-shipowner. Indeed, the Petition represents only the fifth time since 1927 that an attempt has been made to circumvent The Compensation Act by a reference to the personification fiction.

(2) The fact that longshoremen may be entitled to the rights of "seamen" does not mean that they are to be considered to have the same right and immunities as "seamen" who are members of a crew. Shipowners, as a regular practice, hire many more "harbor workers" than they hire "longshoremen". The Petitioner's theories would disrupt the entire workings of The Compensation Act, which controls the relationship of the shipowner and the harbor worker, for if a longshoreman is not subject to the Act when employed by a shipowner, then numerous categories of harbor workers must necessarily be in the same position.

(3) In the six years since certiorari was denied in *Smith v. Mormacdale,* 198 F. 2d 849, (3 C. A. 1952) cert. den. 345 U. S. 908, 73 S. Ct. 648, no material change has taken place. Section 5 of The Compensation Act has not been changed and there has been no complaint by the steamship industry or by the contracting stevedores concerning the fact that some shipowners hire their longshoremen directly.

Each infrequent attempt by an individual to affect judicial legislation concerning The Compensation Act has been unsuccessful. Any change made in the meaning of The Compensation Act should be made by Congress and not by this Court.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: New York, N. Y., July 30, 1958.

Respectfully submitted,

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